

Supreme Court, U. S.  
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IN THE  
**SUPREME COURT OF THE UNITED STATES**  
OCTOBER TERM, 1977

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**No. 77-1040**

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HUGHES AIRCRAFT COMPANY,  
*Petitioner,*

vs.

BELL TELEPHONE LABORATORIES, INCORPORATED,  
*Respondent.*

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**RESPONDENT'S BRIEF IN OPPOSITION  
TO PETITION FOR WRIT OF CERTIORARI**

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There is nothing about this ordinary patent interference which warrants review by this Court.

This is a straightforward action under 35 U.S.C. § 291 to determine priority of invention between interfering patents. The District Court and a unanimous Court of Appeals for the Third Circuit concurred in ruling that the Bell Labs inventors are entitled to priority of invention over Hughes' inventor because they first conceived the silicon-gate process for making field effect transistors and diligently reduced it to practice (App. 1a-30a).\*

Hughes' Petition raises only one issue: Did the Bell Labs inventors diligently reduce their invention to practice?\*\* The

\* "App." refers to the Appendix to the Petition. "Pet." refers to the Petition. Record citations will be to the Joint Appendix ("J.A.") filed by the parties in the Court of Appeals and to the exhibits in evidence for Bell Labs ("PX") and for Hughes ("DX").

\*\* Hughes concedes that the Bell Labs inventors conceived the silicon-gate process earlier than the conception at Hughes (Pet. 3). Under 35 U.S.C. § 102(g), the Bell Labs inventors are the prior inventors of the process and are entitled to the patent on it if (1) they reduced the process to practice before Hughes or (2) they reduced the process to practice after Hughes and exercised reasonable diligence in doing so. The parties stipulated below that the Hughes' process was constructively reduced to practice by the filing of a patent application on October 26, 1966 (J.A. 12). The District Court held that the Bell Labs inventors reduced the invention to practice in December 1966-January 1967, and that they exercised reasonable diligence from their conception up to the reduction to practice (App. 18a).

decisions of the Court of Appeals and the District Court, holding that they were diligent, are manifestly correct.

The lawsuit, in addition, involves a second issue: Whether or not the Bell Labs inventors reduced their invention to practice before the reduction to practice of Hughes and are therefore entitled to priority without regard to their diligence. The Court of Appeals, having found for the Bell Labs inventors on the diligence issue, found it unnecessary to decide this second issue (App. 30a).

Contrary to Hughes' assertions, there are no conflicts in Courts of Appeals' decisions on the question of diligence. The only conflicts—Hughes' own creations—are the gaping disparities between the rules of law which Hughes claims the Courts below applied and the rules of law which the Courts below actually did apply, and the disparities between the facts of this case and what Hughes claims the facts are.

No question of public importance is involved here. And there has been no departure from the usual and accepted course of judicial proceedings. In short, there is no reason, much less a special or important reason, for granting a writ of certiorari in this case.

### **Opinions Below**

The opinion of the Court of Appeals for the Third Circuit is reported at 564 F. 2d 654 (3 Cir. 1977). The opinion of the District Court is reported at 422 F. Supp. 372 (D. Del. 1976). The two opinions are printed in the Appendix to the Petition.

### **Jurisdiction**

The jurisdictional requisites are set forth in the Petition.

### **Questions Presented**

Hughes' two "Questions Presented" are so framed that they create the erroneous impression that the Court of Appeals and the District Court erred as a matter of law in holding that the Bell Labs inventors diligently reduced the silicon-gate process to

practice. But examined in light of the record, Hughes' questions are shown to be challenges to the findings of fact, made by the District Court and affirmed by the Court of Appeals, which support the award of priority of invention. Hughes seeks here, as it unsuccessfully sought in the Court of Appeals, to avoid the "clearly erroneous" standard mandated by Rule 52(a), F.R. Civ.P. for review of findings of fact.

Hughes' Question 1 suggests that the Court below erred as a matter of law in affirming the District Court's determination that the performance of certain development work was sufficiently connected to the invention at issue to constitute reasonable diligence. Hughes asserts that the Court below erred by applying a rule "that experimentation which is directed solely to enhancing the commercial desirability and utility of a particular invention, but which is not necessary for the invention's successful reduction to practice, nevertheless constitutes 'reasonable diligence' in reducing that invention to practice as required by 35 U.S.C. § 102(g)" (Pet. 2). The legal test which the Court actually applied is quite the opposite, namely,

"Whether reasonable diligence has been exercised is a question of fact. . . . It is doubtless true that work quite unconnected with the reduction of an invention to practice cannot be considered." (App. 28a)

No matter how Hughes phrases its challenge, the question it raises is a question of fact. The Court of Appeals affirmed the District Court's finding of fact that the Bell Labs work was sufficiently directed to reduction to practice to constitute reasonable diligence.

"Here the district court found that the work performed by Bell was sufficiently within that area to constitute reasonable diligence. Our consideration of the record satisfies us that this finding was not erroneous, let alone clearly so." (App. 28a)

Question 2 suggests that the Court below erred as a matter of law in affirming the District Court's finding of fact that testimony of the Bell inventors relating to their diligence was sufficiently corroborated. According to Hughes, the Courts below



applied the rules that inventors' diligence may be established "through their own uncorroborated, undocumented oral testimony and other noncontemporaneous evidence" (Pet. 2) and "by oral testimony of co-inventors and by *noncontemporaneous documents* prepared by the inventors themselves" (Pet. 20, emphasis by Hughes). The rule which the Courts below actually applied is again quite different. The District Court made its determination of diligence on the basis of "competent evidence" (App. 19a) which included, in addition to the testimony of the inventors and their contemporaneous documents, testimony and contemporaneous documents of others at Bell Labs. The Court of Appeals affirmed:

"Since the function of the corroborating evidence is to assist the fact finder in deciding whether the inventor's testimony is credible, the question whether its amount and quality is adequate for that purpose is peculiarly for the fact finder to pass upon in the light of the circumstances of the case. . . . Here the district court found that the testimony of the Bell inventors as to their work in reducing their invention to practice was sufficiently supported by corroborating evidence to be credited. We find no error in this regard." (App. 29a)

Again, not withstanding how Hughes phrases the question, its challenge goes to findings of fact made by the District Court and affirmed by the Court of Appeals.

To conjure up its non-existent questions of law, Hughes has misstated the record to fit its needs. Clarification is required; therefore, we turn to the record and to the correction of Hughes' misstatements.

### Statement Of The Case

The invention common to the interfering Bell Labs and Hughes patents is a process for manufacturing field effect transistors known as the silicon-gate process. A field effect transistor is a small three-electrode electronic amplifier which is used in electronic circuits (App. 4a). The process of the invention utilizes a "self-alignment" technique to eliminate the problem of position-

ing the gate electrode (which controls the amount of electric current flowing through the transistor) (App. 5a).

Hughes has conceded that the Bell Labs inventors, Robert Kerwin, Donald Klein and John Sarace, conceived the silicon-gate process in February-March 1966, before the May 1966 conception date of Hughes' inventor, Hans Dill (Pet. 3-4).

By June 1966, the Bell Labs inventors had conducted "clearly successful" probe tests on devices made by the silicon-gate process which showed that the devices displayed transistor activity in a "commercially accepted range" (App. 9a-10a). In contrast, as the District Court found in an earlier case involving the Hughes' Dill patent,\* Dill filed his patent application without ever achieving successful probe tests on devices made by the silicon-gate process (374 F. Supp. at 1170-71).\*\* It is undisputed that Hughes' work on the silicon-gate process before filing did not amount to an actual reduction to practice (374 F. Supp. at 1171). Dill filed his patent application on a process which he could only hope would work (PX-2).

Following the successful June tests, the Bell Labs inventors continued their work on the silicon-gate process. And during the period starting in mid-November 1966, Bell Labs began the time-consuming life tests which the District Court found established a reduction to practice in December 1966-January 1967 (App. 17a). Hughes did not below dispute that the Bell Labs inventors exercised reasonable diligence through June 1966 and that they were diligent after November 15, 1966 (Hughes' Brief filed with the Court of Appeals, p. 23).

Hughes challenge to Bell Labs' priority thus centers on work which took place at Bell Labs from about July 1966 until mid-November of that year. In its Petition, Hughes has mischaracterized that Bell Labs work. According to Hughes, Bell Labs'

\* *Hughes Aircraft Company v. General Instrument Corp.*, 374 F.Supp. 1166 (D.Del. 1974), cited in the District Court's opinion in this case at pages 2-3 of the Appendix to the Petition.

\*\* Nor had he performed any life testing of devices (See J.A. 12-14, Pretrial Order, ¶¶C 14(a)-(i)).

employees in June, 1966 "postponed completion of testable devices in favor of experimentation directed at collateral goals" (Pet. 5). The undisputed and fully corroborated evidence shows otherwise; the Bell Labs inventors diligently pursued work directed to reducing the process to practice.

In June 1966, Bell Labs inventor Sarace, who had earlier spent 30-40% of his time on the silicon-gate process, began devoting 100% of his time to it (J.A. 599, 452, 469). His co-inventor Klein, consulted with Sarace on a daily basis (J.A. 116). The Bell Labs models laboratory, under Werner Bracht, continued devoting one man-day per day to the silicon-gate process up until about September. By that time, the various steps in the process had become sufficiently established that the work took less time, requiring one-half man-day per day into 1967 (J.A. 293, 298).

Bell Labs researcher Ronald Finne continued spending approximately 80% of his time on the silicon-gate process to the end of July when he left Bell Labs, at which time the models laboratory picked up and performed the work he had been doing (J.A. 283, 296). Bell Labs' Roger Edwards continued in his role as advisor to the inventors and assisted Sarace in performing electrical tests (J.A. 322-323, 116). Others at Bell Labs, including Messrs. Lieberman, Grieco and Hauser, deposited insulator films for Sarace to use in his work (J.A. 15-16, Pretrial Order, ¶¶ C 21, 22, 23, PX 16, p. 58, PX 18, PX 19, J.A. 421). Nigh tested Sarace's devices (J.A. 397-402). Finne, Bracht, Edwards, Cleveland, Nigh, Hauser and Biondi, all non-inventors, testified at trial concerning the work during this time period. In addition, the work of Lieberman and Grieco, as shown in their notebooks, was stipulated to by Hughes.

Sarace worked on several aspects of the silicon-gate process following the May-June 1966 probe tests, including etching, high threshold voltages on "P Channel" devices made by the process, problems with use of photo-resist materials in the process, and hysteresis (J.A. 591-592, n.10).

On September 16, 1966, Klein's supervisor, Cleveland, summarized the work to that date and the work then in progress in a

memorandum to his supervisor, Biondi. Cleveland noted that by that date approximately 10 slices of silicon had been processed to make both "P" and "N" Channel devices (PX 31, p. 3).

On September 20, 1966, following Cleveland's memorandum, the Bell Labs inventors met with their patent attorneys to discuss filing a patent application on the silicon-gate process.\*

Work done on a hysteresis problem led the inventors to conclude that the problem lay in the use of a silicon nitride insulator. Therefore, they used a different insulator in the process which avoided the hysteresis problem (J.A. 457, 110-111, PX 42). By late November, Sarace had finished devices which had this insulator.\*\* In about the last week of November, Sarace sent some of these devices, with metal leads attached, to Harold Nigh at Bell Labs' Allentown laboratory for testing (J.A. 397-402).

Sarace and Edwards performed tests on others of these devices and the life tests were begun (J.A. 458-461, 322-329, PX 41, PX 46, PX 47). Contemporaneous data sheets handwritten by Edwards and Sarace record some of these tests (PX 41, PX 46, PX 47). The inventors Kerwin and Klein also documented some of the work done in this period in handwritten memoranda (PX 44, PX 45).

On December 9, 1966, Sarace gave a presentation to colleagues at Bell Labs' Allentown facility at which he used in his presentation viewgraphs which showed the silicon-gate process and its development and which explained in detail the work which had been done (J.A. 599, 462-468, 391; PX 42).

These viewgraphs and the data sheets prepared by Sarace and Edwards show test results for the 84th, 85th and 86th silicon slices processed at Bell Labs in the silicon-gate work prior to that time (J.A. 461).

\* A formal write-up of the process was prepared sometime thereafter and was submitted to the attorneys on November 15, 1966 (PX 35).

\*\* The undisputed evidence establishes that, because of the many operations involved, it took between one to two months to process a device made by the silicon-gate process (J.A. 458, 173-174, 296).



The hysteresis problem was only one of the problems Bell Labs faced in developing the silicon-gate transistor process. Other development difficulties also included the problems of over-etching, photo resist materials, and high thresholds (App. 11a). Sarace and his co-workers set out to solve, and did solve, those problems during the period in issue.

Hughes now tells this Court, ten years after the fact, that the work at Bell Labs was "experimentation directed at collateral goals." What Hughes has done is to dissect the work done on the silicon-gate process, focus on a single aspect of that work—solving the hysteresis problem—and argue that such work was not a reasonable exercise of diligence. The District Court properly rejected Hughes' argument. Considered in light of the facts and circumstances of this case, solving the hysteresis problem was a reasonable exercise of diligence. As the Court found:

"While hysteresis did not make these devices totally unsatisfactory, it was a deficiency which it was desirable to overcome." (App. 11a)

The Court further found that the silicon-gate process, as it existed in the fall of 1966, could not readily be subjected to such rigid compartmentalization, as Hughes would have it, and further confirmed that the work done on the process in that period was a reasonable exercise of diligence (App. 18a-19a; n. 19).

The Court of Appeals affirmed these findings as not erroneous, let alone clearly so:

"The district court found that the work performed by Bell was sufficiently within that area [the area of reducing the invention to practice] to constitute reasonable diligence. Our consideration of the record satisfies us that this finding was not erroneous, let alone clearly so." (App. 28a).

The second prong of Hughes' argument is directed against the District Court's finding of fact, affirmed by the Court of Appeals, that the testimony of Bell Labs' inventors as to their work in reducing their invention to practice was sufficiently corroborated by "competent evidence." (App. 19a and 29a).

Following the pattern set in its argument with respect to diligence, Hughes has misstated the record, arguing that the Court below followed the rule that "oral testimony of inventors is sufficiently corroborated if supported by oral testimony of co-inventors and by *noncontemporaneous documents* prepared by the inventors themselves" (Pet. 20, emphasis by Hughes).

A prime example of this is at page 6 of the Petition where Hughes asserts that

"To reconstruct the events of the period between October 17 and some time in December, when the trial court held that reduction to practice may have occurred, Bell relied upon the almost ten-year-old recollections of the Bell inventors themselves, and of their co-workers, without the benefit of any written chronicle of Bell's activities."\*

Hughes is flatly wrong. The work of Bell Labs during this period is well corroborated by contemporaneous writings and testimony. It is summarized in the January 1967 entries in Sarace's notebook (PX 16); it is shown in the viewgraphs for Sarace's December 9, 1966 presentation (PX 42); in the test data recorded in Plaintiff's Exhibits 41, 46 and 47; in the November 15, 1966 and January 5, 1967 letters (PX 35, PX 48), in Kerwin's handwritten comparisons of work done at Bell Labs' Allentown, Pennsylvania, and Murray Hill, New Jersey facilities (PX 44), and in Klein's handwritten notes (PX 45).

Moreover, because it took one to two months to process each silicon slice made by the silicon-gate process, a notebook entry, a data sheet or other document recording tests results represents

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\* Hughes never makes clear in its Petition the period of time during which Bell Labs' activities are supported only by what Hughes contends to be "uncorroborated evidence" (Pet. 2). At one point Hughes refers to "the rest of the fall and early winter of 1966" (Pet. 5). Another reference is to the period from October 17, 1966 and "some time in December" (Pet. 6, 22). In its Brief filed with the Court of Appeals (p. 23) Hughes conceded that Bell Labs was diligent from November 15, 1966 through early January, 1977.

the culmination of many weeks' work, not just the work done on the day or days the tests were performed (J.A. 458, 173-174, 296).<sup>\*</sup> In addition, Bracht, Nigh, Hauser, Cleveland, Biondi and Edwards—all non-inventors—testified in corroboration of the work done (J.A. 286-438).

Significantly, Hughes itself did not below dispute, and here concedes (Pet. 6), that Sarace devoted 100% of his time to the silicon-gate process after the May-June, 1966 tests. Hughes' protestations about corroboration of that conceded 100% effort therefore have a hollow ring.

The bankruptcy of Hughes' assertions regarding the alleged lack of corroboration is made plain by Hughes' specific contention that "important" Bell Labs documents were destroyed (Pet. 22). This is the third time that Hughes has scraped the bottom of the barrel and made this *ad hominem* charge. Both Courts below rejected Hughes' charge out of hand. It should be likewise rejected here.

Hughes knows full well that no laboratory notebooks, no laboratory reports and no technical memoranda relating to this work were destroyed at Bell Labs.

Hughes also knows that the only "documents" relating to this work which were not preserved, were such things as laboratory routing slips, handwritten notes and rough data sheets—none of which are required to be retained by Bell Labs policies (J.A. 295; DX 12). And even as to these, Hughes knows that Bell Labs searched for them and that many were found among the witnesses' papers and produced. That Hughes must dredge up for the third time this discredited charge emphasizes the total lack of substance in its Petition.

<sup>\*</sup> This is confirmed by Hughes' own records. There are gaps of several weeks, and in some instances, of more than a month, between entries relating to silicon-gate work in the notebook of Hughes' inventor Dill (J.A. 12-14, Pretrial Order, ¶¶C 14(a)-(i)).

## Reasons For Denying The Writ

### 1. The Holding Of Reasonable Diligence Below Was Manifestly Correct

The Court of Appeals, inquiring into the question of reasonable diligence in this case correctly set forth the law as it stands in the Third Circuit and in other Courts of Appeals:

"Whether reasonable diligence has been exercised is a question of fact. . . . It is doubtless true that work quite unconnected with the reduction of an invention to practice cannot be considered. (App. 28a)<sup>\*</sup>

Hughes completely ignores this clear statement of the rule applied by the Court of Appeals, asserting that the Court of Appeals (and the District Court) followed the rule that:

"... work on problems related solely to commercial utilization and not to reduction to practice, can be deemed 'reasonable diligence' in reducing an invention to practice within the meaning of 35 U.S.C. § 102(g)." (Pet. 8)

Hughes' statement is diametrically opposed to the rule of law actually applied.

Stripped to its essentials, what Hughes urges is a new *per se* rule of law. Hughes' rule would require an inventor to reduce his

<sup>\*</sup> The principle that the question of diligence is a question of fact, is well established. *E.g., Martus & Becker v. Heise*, 39 F.2d 715, 717 (C.C.P.A. 1930): "The question of diligence is one of fact, and must be determined in each case in the light of the prevailing conditions and circumstances."; *S. & S. Corrugated Paper Mach. Co. v. George W. Swift, Inc.*, 176 F.2d 358, 361 (3 Cir. 1949): "The plaintiff, nevertheless, insists that the evidence requires a finding of diligence as a matter of law. But diligence in this field is historically a question of the conduct of the inventor, or other party who bears that burden, under the circumstances peculiar to his case. To attempt a legal formula would be travail without recompense." See also, *Electro-Metallurgical Co. v. Krupp Nirosa Co.*, 122 F.2d 314, 317 (3 Cir. 1941); *Eclipse Mach. Co. v. E. Krieger & Son*, 87 F.2d 755, 757 (2 Cir. 1937); *Rines v. Morgan*, 250 F.2d 365, 369 (C.C.P.A. 1957); *Shell Development Co. v. Pure Oil Co.*, 111 F.Supp. 197, 207 (D.D.C. 1953), *aff'd sub nom. Pure Oil Co. v. Socony-Vacuum Oil Co.*, 212 F.2d 454 (D.C. Cir. 1954) and *Harper v. Zimmermann*, 41 F.2d 261, 268 (D.Del. 1930).



invention to practice as soon as it reaches its crudest form and that he otherwise forfeit the invention no matter how reasonable his work may be in the circumstances. That is not the law. It has never been the law. And it should not become the law.\*

Contrary to Hughes' assertion (Pet. 9 n.4), the Court of Appeals for the Third Circuit has not "overruled" any of its earlier decisions. Indeed, both the Court of Appeals and the District Court specifically cited *Riche v. Permutit Co.*, 47 F. Supp. 275 (D. Del. 1942), *aff'd per curiam* 135 F. 2d 922 (3 Cir. 1943) (cited by Hughes at Pet. 9 n.4) and found the rule of that case to be inapplicable to the facts of the Bell Labs work (App. 19a, 28a).\*\*

Hughes devotes a significant portion of its argument to reviewing authorities which hold that efforts totally unrelated to reducing an invention to practice cannot be considered diligence (Pet. 12-13). Hughes begs the question by relying on these authorities, and fails to come to grips with the dispositive question of fact. As the Court of Appeals stated:

"... whether particular work is sufficiently connected with the invention to be considered to be in the area of reducing it to practice must be determined in the light of the particular circumstances of the case which may be as varied as the mind of man can conceive. It is thus peculiarly a question of fact for the finder of facts to determine in the light of those circumstances." (App. 28a)

The District Court made the factual determination that the development work which Hughes challenges as collateral was a reasonable exercise of diligence, and the Court of Appeals affirmed (App. 28a).

\* The cases Hughes cites as the supposed basis for this rule are cases in which a party was able to prove reduction to practice *despite* the fact that the invention was not perfected. None of these cases even suggests that an inventor is *required* to reduce the invention to practice in its crudest form.

\*\* The other case cited by Hughes, *S. & S. Corrugated Paper Mach. Co. v. George W. Swift, Inc.*, 176 F.2d 358 (3 Cir. 1949) is similarly inapplicable to the facts here. In that case, the dispositive issue was whether or not the work urged as diligence had been done at all, not the character of the work.

There are no conflicts here other than the conflict between the rule of law actually applied and the rule of law Hughes claims was applied. Hughes has no basis for challenging the finding of diligence.

## **2. The Holding That The Testimony Of The Bell Labs Inventors Was Corroborated By Competent Evidence Was Manifestly Correct**

In considering and affirming the District Court's finding of fact that the testimony of the Bell inventors was supported by "competent evidence" (App. 19a) the Court of Appeals correctly applied the following standard:

"Since the function of the corroborating evidence is to assist the fact finder in deciding whether the inventor's testimony is credible, the question whether its amount and quality is adequate for that purpose is peculiarly for the fact finder to pass upon in the light of the circumstances of the case. . . . Here the district court found that the testimony of the Bell inventors as to their work in reducing their invention to practice was sufficiently supported by corroborating evidence to be credited. We find no error in this regard." (App. 29a)

Consistent with the tactics used throughout its petition, Hughes completely ignores this clear statement of the standard applied by the Court below, asserting that the Court of Appeals (and the District Court) followed the rule that "oral testimony of inventors is sufficiently corroborated if supported by oral testimony of co-inventors and by *noncontemporaneous documents* prepared by the inventors themselves" (Pet. 20, emphasis by Hughes). That the Courts below applied no such rule is manifest from the scope of the evidence from many sources, both documents and testimony, which we have reviewed above (pp. 5-10 *supra*).

Hughes again has attempted to create the impression that a conflict exists between the rule of law applied by the Court below and by other Courts of Appeals. Hughes alleges that even apart from the opinions below a conflict exists between the Courts of Appeals with respect to corroboration. In citing a "*per se* rule"

and a "rule of reason" Hughes attempts to create confusion by the use of labels.\*

Above all, Hughes creates a conflict which is meaningless here. No matter which of Hughes' rules is applied to the facts of this case, the corroboration of the Bell Labs inventors' testimony, fully meets all requirements.

The District Court was well aware that "in making such account [of diligence], the testimony of the inventors alone is usually deemed insufficient" (App. 18a). Both the District Court and the Court of Appeals found there to be ample competent evidence to corroborate the inventor's testimony. Neither Hughes' "*per se*" cases nor its "rule of reason" cases help it here.\*\*

Hughes finally reaches its real point on the question of corroboration at pages 20-25 of its Petition. Unable to show any error in either the law or the findings below, Hughes raises for the first time in its Petition a new rule of law precluding use of "noncontemporaneous" documents. (Hughes ignores the corroborating testimony of the inventors' co-workers). We might almost call it a special rule of law—one written by Hughes to apply to Bell Labs in litigation against Hughes.\*\*\*

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\* The cases Hughes cites demonstrate that Hughes is confused by its own labels. For example, in Hughes' "*per se*" case, *Cleeton v. Hewlett-Packard Company*, 343 F.Supp. 1215 (D.Md. 1972), the Court cited, and applied, the standard of Hughes' leading "rule of reason" case, *Ritter v. Rohm & Haas Company*, 271 F.Supp. 313 (S.D.N.Y. 1967).

\*\* To the contrary, the facts of these cases demonstrate the soundness of the holdings below. For example in *Potter Instrument Co., Inc. v. Odec Computer Systems, Inc.*, 370 F. Supp. 198, 208 (D.R.I. 1974), labelled by Hughes as a *per se* case, testimony establishing diligence was corroborated through a written report and construction of models. The corroboration of the Bell Labs inventors' testimony certainly meets that standard. It far exceeds the corroboration found wanting in others of Hughes' *per se* cases. And even Hughes must concede that the facts here meet the requirements of its "rule of reason" cases.

\*\*\* We seriously doubt, if the existing documentation of Dill's work is any example (J.A. 12-14, Pretrial Order ¶¶C 14(a)-(i)) that Hughes, itself a "large patent-wise corporation", has any interest in seeing this special rule applied to itself.

Hughes makes much use in its Petition of the word "noncontemporaneous" to describe the Bell Labs documents and leaves the impression that the Bell Labs documentation was written long after the work was done.

But documents such as data sheets recording test data as it was taken are hardly "noncontemporaneous" documentation (PX 41, PX 46, PX 47). And only by the most blatant stretching can Hughes describe as "noncontemporaneous" the December 9, 1966 viewgraphs, which show in detail the work done on the January 5, 1966 memorandum describing that work (PX 42, PX 48). In the final analysis, the Bell Labs work even meets the requirements of Hughes' special rule.

Hughes professes concern that the decision below "invites both perjury and the destruction of adverse documents" (Pet. 22).\* Hughes would do better to concern itself with its attempts to create conflicts which do not exist and errors that were never made.

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\* Hughes, of course, notes that it does "not charge that fraud occurred in this case." (Pet. 23)

**Conclusion**

The Petition is without merit and should be denied.

Respectfully submitted,

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